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IN THE

# Supreme Court of the United States

WILLIAM I. KOCH; OXBOW ENERGY, INC.; SPRING CREEK ART FOUNDATION, INC.; NORTHERN TRUST COMPANY; FREDERICK R. KOCH; and THE FIDUCIARY TRUST COMPANY INTERNATIONAL,

*Petitioners,*

v.

KOCH INDUSTRIES, INC.; CHARLES G. KOCH; STERLING V. VARNER; DAVID H. KOCH; DONALD L. CORDES; and THOMAS M. CAREY,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents cannot and do not deny the pervasive and entrenched split presented by this Petition. Rather, they snipe meaninglessly at the edges of the split and beg the question presented by arguing that the Tenth Circuit's error in using the wrong harmless-error standard was itself harmless error. What Respondents fail to do, however, is provide a cogent reason for allowing this split to fester any longer. The split will not go away by itself, it is cleanly presented by the Petition, the parties are highly motivated, and there are no vehicle problems. The choice between standards for harmless error is also meaningful to the resolution of this case because, despite Respondents' distorted discussion of the facts and opinion below, the evidentiary errors easily exceed the majority harmless-error standard.

## I. THE 8-4 SPLIT OVER THE CIVIL HARMLESS-ERROR TEST IS REAL, MEANINGFUL, AND INTRACTABLE.

Twelve of thirteen circuits are participants in the split over which harmless-error standard to use in civil cases. The split is widely recognized and the meaningful difference between the two standards has been extensively discussed. Pet. 7-10. The split is entrenched and Respondents do not suggest it will ever be resolved absent intervention by this Court.

Rather than deny the obvious, Respondents argue that "the circuit courts do not fall crisply into two camps" and that this Court should tolerate the existing "variety" among the circuits on this fundamental procedural standard. BIO 14. The first argument is both wrong and irrelevant, the second argument asks this Court to abandon its fundamental role in assuring that federal law is equally and fairly administered throughout the federal judicial system.

Regarding the nature and significance of the split, Respondents ignore the statements of the circuits themselves, many of whom have expressly and "crisply" rejected what they view as the materially different approach of their opposing sister circuits. The Ninth Circuit, which in 1983 led the way in creating this split, *see Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458 (CA9 1983), continues to recognize the meaningful difference between its "'less stringent'" minority approach and the majority *Kotteakos* standard. *Kennedy* v. *Southern California Edison Co.*, 219 F.3d 988, 998 (CA9 2000) (citation omitted). And the Third Circuit, in rejecting the Ninth Circuit's approach, unambiguously described that approach as "imposing a laxer harmless error standard in civil cases" and described the alternate *Kotteakos* approach as making it "more difficult to prove harmless error." *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 925 (CA3 1985).

Respondents' attempt to blur the well-recognized distinction between the two camps, BIO 14 n. 13, simply pulls lan-

guage out of context and is, in any event, irrelevant. Each of the majority-side formulations quoted by Respondents comes down to the same point: that even a substantial possibility of influence from the error constitutes harm. Each of the minority-side courts, by contrast find harm only where an error more probably than not *caused a different result.* Pet. 7-8; *see* Pet. App. A42 (whether "jury would have found for" plaintiffs but for the error).

Rather than being mere "semantic[s]," BIO 15, the different approaches affect outcomes. Thus, the Third Circuit emphasized the significance of the divide by noting that the more stringent standard it went on to adopt "would result in more reversals." *McQueeney,* 779 F.2d at 926. And in a related criminal context, Judge Kozinski observed that the choice between the *Kotteakos* standard and the more-probable-than-not standard "isn't just wordplay." *United States* v. *Hitt*, 981 F.2d 422, 425 n. 2 (CA9 1992).[1]

> A 55% likelihood that the error was harmless qualifies as "more probable than not," but it's hardly a "fair assurance" of harmlessness. *Kotteakos* defines "fair assurance" as absence of a "grave doubt," 328 U.S. at 765, 66 S. Ct. at 1248, and a 45% chance that the defendant would have been acquitted but for the error certainly seems like a "grave doubt." While we obviously don't deal in such precise probabilities, "more probable than not" and "fair assurance" can, in some cases, lead to conflicting results.

*Id.*

The claim that both sides of the split "look to the same factors" under their respective tests, BIO 11, misses the point.

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[1] Judge Kozinski was comparing standards in a since-resolved apparent intra-circuit split wherein some panels of the Ninth Circuit seem not to have felt obliged to follow *Kotteakos* even in criminal cases. 981 F.2d at 425. While having abandoned that view on the criminal side, the Ninth Circuit continues to deviate from the *Kotteakos* standard on the civil side.

It is not the various *inputs* to harmless-error analyses that are driving the split, but rather it is the *standard* or required degree of certainty against which those inputs are measured that is causing disagreement.[2] In the end, the minority more-probable-than-not standard represents a materially different approach that leads to different results across a broad range of cases where errors may have had an *influence* on the case, but cannot be found, *ex post*, to have more likely than not changed the result.

Regarding whether this Court should simply tolerate the divergent standards splitting the Circuits, suffice it to say that ensuring uniform administration of federal law is one of the Court's long-recognized and primary functions. The arbitrary suggestion that this widespread split simply be ignored disserves this Court and disserves the many litigants whose "substantial rights" now turn on geography rather than law.

## II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICT.

Respondents are wrong in contending that this case in not an appropriate vehicle for addressing the split because the evidence was harmless under any standard. BIO 8. The evidence was highly prejudicial and likely would have required reversal under the standard mandated by this Court in *Kotteakos*. Respondents' arguments to the contrary are belied by their own prior admissions as to the importance of the disputed evidence and are based upon subtle mischaracterizations of the Tenth Circuit's conclusions.

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[2] This Court has recently had considerable briefing on precisely the difference between directions to consider certain evidence and the standard or "intelligible principle" against which that evidence must be measured. *See, e.g.*, Brief of *Amici Curiae* Association of American Physicians & Surgeons and Center for Individual Freedom in Support of Respondents, *Browner* v. *American Trucking Ass'ns*, No. 99-1257, at 19-20, 25-26 (Sept. 11, 2000).

### A. The Tenth Circuit's Opinion Contains No Indication That The Error Would Be Deemed Harmless Under *Kotteakos*.

In its opinion, the Tenth Circuit reached the following conclusions:

- "[W]e cannot reasonably conclude that the jury *would have found* for the Plaintiffs had it not learned of [the evidence at issue]."
- "[I]t is extremely doubtful that the [evidence at issue] *caused* the jury to find for the Defendants."

Pet. App. A42 (emphasis added). These conclusions articulate a "but for" test, focusing on whether the absence of error would have changed the result. The court was simply applying the established Tenth Circuit standard, which it has acknowledged to be more difficult for appellants to satisfy and more forgiving of errors. *See United States Indus.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1252-53 n. 39 (CA10 1988) (recognizing that Tenth Circuit applies a "lower standard in civil cases"), *impliedly overruled on other grounds as recognized in Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1288 (CA10 1998).

The test set forth in *Kotteakos* is markedly different. In *Kotteakos* this Court stated that a judgment must be reversed unless the reviewing court can conclude with "fair assurance" that the error did not "*influence*" the jury and that the judgment was not "*substantially swayed* by the error." *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946) (emphasis added). All the Tenth Circuit said was that *it* could not conclude that the jury "would have" come out the other way. That is precisely the sort of analysis that this Court rejected in *Kotteakos*. As this Court explained in *Kotteakos*, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." 328 U.S. at 764-65.

In an effort to suggest that the error would have been deemed harmless even under the stricter *Kotteakos* standard, Respondents repeatedly mischaracterize the Tenth Circuit's opinion. For example, Respondents constantly misdescribe the Tenth Circuit's opinion as concluding that it is "'extremely doubtful' that the error *affected* the jury's verdict." BIO at 9, 11. But as can be seen from the full quotations provided above, the Tenth Circuit did not find that it was "extremely doubtful" that the error "*influenced*" or "*affected*" the jury's verdict. It concluded at most that the error probably did not by itself *cause* the jury to find as it did.

The Tenth Circuit never determined whether the error might have "influenced" or "substantially swayed" the jury's verdict, as would be required by *Kotteakos*. To speculate at the petition stage on how that court would rule under the correct standard both usurps that court's prerogative and is not necessary in order for this Court to reach the legal issue presented. Rather, this Court can set the proper standard and leave application of that standard to the Tenth Circuit.

**B. The Improperly-Admitted Evidence Was Sufficiently Significant As To Require Reversal Under *Kotteakos*.**

Respondents are also wrong in their new-found disdain for the importance of the evidence they fought so hard to introduce. William Koch was both the lead plaintiff and the plaintiffs' most important fact witness at trial. Pet. App. B11. William Koch was the only plaintiff present at meetings in which defendants claimed to have disclosed the information at issue, and he in large measure represented the other plaintiffs in the negotiations with defendants. *Id.* He was thus the key witness for plaintiffs on almost *all* of the required elements of plaintiffs' claims, including whether defendants made misrepresentations and/or omissions, whether those misrepresentations were material, whether plaintiffs relied on defendants' misrepresentations, and whether they were damaged as a result.

Respondents now claim that "the disputed evidence did not bear on any of the required elements of plaintiffs' claims" and that it related to "only two of more than a dozen plaintiffs." BIO 8.[3] However, when Respondents sought to introduce this evidence they said precisely the opposite:

> William I. Koch is not only the lead plaintiff in this case. He is also the key non-expert witness supporting plaintiffs' claims.

Defendants' Br. in Opp. to Plaintiffs' Eight Motions *In Limine*, at 5.[4]

Respondents' real views regarding the importance of the improperly-admitted evidence are also made clear by their actions at trial. William Koch was such an important fact witness that Respondents cross-examined him for five straight days. It is also telling that the introduction of the evidence at issue was the *grand finale* of that five-day cross-examination. It was the one moment of high drama in a long trial that otherwise droned on and on about arcane issues related to generally accepted accounting principles and petroleum engineering. For Respondents now to claim that this emotionally-charged evidence must have been lost on the jury due to the length of the trial borders on the absurd. Respondents used the evidence in their opening statements, in their cross-

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[3] That latter claim is highly misleading. The two plaintiffs at issue – William and Frederick Koch – collectively owned (directly and indirectly) nearly three fourths of the stock held by the entire plaintiff group. Most of the other plaintiffs were corporations, trusts, or charitable foundations within their control

[4] In allowing Respondents to admit the evidence at issue, the district court agreed with Respondents and remarked: "The defendants point out that William Koch is not only the lead plaintiff, but he will likely be the fact witness most critical to the plaintiffs' success. In addition, William Koch assumed a leadership role with respect to the other selling shareholders and possessed more technical knowledge of the facts and issues by reason of his education, training and experience." Pet. App. B11.

examination of plaintiffs' most important witness, and again made veiled references to it in their closing argument.[5]

This strategic use of powerful evidence cannot be discounted as mere "passing mention." BIO 3. And if the references to the evidence made in Respondents' closing were not as direct as earlier, it was because they did not need to be – Respondents knew the judge would remind the jury for them. The district judge specifically instructed that "you may consider this evidence [about other lawsuits] on issues of the motives, intent, bias, and credibility of the parties." Tr. Vol. P4, at 3195; Pet. App. A39. The Tenth Circuit concluded that the admission of that evidence was error and that the instruction compounded rather than cured the error. Pet. App. A39, 42. If the jurors remembered *anything* in their deliberations, they surely remembered that William and Frederick Koch "sued their own mother." They likely also remembered that she ultimately disinherited them over *this very lawsuit.*

Respondents' reliance on the district court's admonitions that the case should not be decided on the basis of "passion or prejudice," BIO 5, is a complete red herring. As an initial matter, evidence that the plaintiffs in a case "sued their own mother" is precisely the sort of inflammatory and inherently prejudicial evidence that cannot be cured by such an instruction. But even assuming it could, the evidence nonetheless may have strongly influenced the jury's findings. Respon-

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[5] In their closing argument, Respondents asked the jury to consider William Koch's "hostility toward Charles," that William had used the "leverage of litigation" before, and that William Koch has "been at war with his brother, Charles, ever since [the buyout]." Tr. Vol. T10, pp. 7293, 7295, 7317. But nothing best brought this evidence to the front of the jurors' minds more than Respondents' final comments: "That's what this case is about. It's a modern parable. And the moral is, beware of a brother driven by the need for more money, by greed, and the desire to rule or ruin, because if you don't, you're in for 20 years of corporate warfare." Tr. Vol. T10, p. 7320.

dents expressly sought the admission of this evidence in order to "demonstrate bias" on the part of William Koch and thereby attack his credibility. Pet. App. A38-39. The district court erroneously allowed it to be admitted for that very purpose, and in fact expressly instructed the jury to consider it in evaluating the parties' "motives, intent, bias, and credibility." Tr. Vol. P4, p. 3195. The Tenth Circuit concluded that this was error. Pet. App. A42.

The district court expressly found that the improperly-admitted evidence bore upon the issues of reliance, plaintiffs' actual knowledge, and the adequacy of Respondents' representations. Pet. App. B12. Indeed, the district court further concluded that the improperly-admitted evidence was "*central to the defendants' case in several regards*," and that excluding "*these critical points*" would "*eviscerate the defendants' case.*" *Id.* (emphasis added).

Given the views of the parties and the district court below, it strains credulity for Respondents now to contend, BIO 9, that this Court and the Court of Appeals would have to be "sure" that the erroneous introduction of highly prejudicial evidence – including evidence that the principal plaintiffs "even sued their own mother" – did not "influence" or "substantially sway" the jury's verdict.[6] Because William Koch was the plaintiffs' most important fact witness at trial, the improper admission of the evidence at issue went straight to the heart of almost *every* core issue in the case.

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[6] Respondents claim the secondary split over the risk of uncertainty or doubt, Pet. 9 n. 4, is not implicated in this case. BIO 12. Regardless whether such uncertainty failed to appear under the forgiving standard applied below, such uncertainty would certainly exist under the *Kotteakos* standard. This case thus presents an opportunity first to articulate the correct harmless-error standard and then to allocate the risk under that standard if the question remains close.

### C. It Is Inappropriate To Wait for A Better Vehicle That Will Never Come.

Respondents claim that the high stakes and thorough representation in this case do not distinguish it from other potential vehicles. BIO 13. Were that true, surely Respondents could have offered an example. But in fact, while Respondents agree with Petitioners and are correct in noting that this issue arises in hundreds of cases, *id.*, it seems rarely to appear in petitions to this Court. For example, in the most recent case to elaborate on the split, *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (CA4 1999), *cert. denied,* -- U.S. --, 120 S. Ct. 1243 (2000), the party in fact petitioned the Court, but did not present the harmless-error question. *See* Petition, *Taylor* v. *Virginia Union Univ.*, No. 99-1092 (Dec. 27, 1999). Respondents point to no case in which this Court actually had an opportunity to address the split. The harmless-error standard thus represents something of a paradox – all parties agree that the issue pervades the lower courts, yet the split is rarely presented for this Court's review. Unlike some questions on which the opportunities for review are indeed legion, Respondents simply cannot point to single credible alternate vehicle either pending or on the horizon that would allow this Court to resolve the split.

The current case is as good a vehicle for resolving this split as this Court is likely to see for a long time. Any question as to how the Court of Appeals would rule on remand under a new standard has not previously hindered this Court's review of even narrower harmless-error questions, *see O'Neal* v. *McAninch*, 513 U.S. 432 (1995), and can be left to the Tenth Circuit itself on remand

## CONCLUSION

For the foregoing reasons and those set out in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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